STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THURMAN JONES,

Defendant-Appellee.

UNPUBLISHED
February 1, 2007

No. 273193
Genesee Circuit Court
LC No. 05-015500-FC

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

The prosecution charged defendant with open murder, MCL 750.316, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, assault with intent to rob while armed, MCL 750.89, and felony murder, MCL 750.316(1)(b). Defendant filed a motion to suppress his confession and, after an evidentiary hearing, the trial court granted defendant's motion. The prosecution filed a delayed application for leave to appeal, which this Court denied. The prosecution then filed an application for leave to appeal with the Supreme Court and, in lieu of granting leave to appeal, the Supreme Court remanded the case to this Court "for consideration as on leave granted." *People v Jones*, 477 Mich 861; 721 NW2d 175 (2006).

The prosecution argues that the trial court erred when it granted defendant's motion to suppress his confession on the grounds that he unequivocally asserted his right to counsel. We disagree.

In reviewing the determination of the admissibility of a confession, this Court considers the record, the conclusions of law, and application of the law to the facts de novo, but we review the trial court's factual findings for clear error. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001); *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake was made. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

A suspect in police custody must be informed of his right to remain silent and his right to have an attorney present before being questioned. *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Kowalski*, *supra* at 464. When a suspect invokes his right to counsel during a custodial interrogation, he may not be further interrogated by the police until counsel has been made available, unless the accused initiates further communication, exchanges,

or conversations with the police. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *Miranda*, *supra* at 474. This *Edwards* safeguard is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v Harvey*, 494 US 344, 350; 111 S Ct 2204; 108 L Ed 2d 158 (1991).

The application of the *Edwards* rule depends on whether the defendant *actually* invoked his right to counsel. The inquiry is objective; the invocation of the right to counsel requires a statement which can be reasonably construed as an expression of the desire for the assistance of counsel. An ambiguous or equivocal statement "in that a reasonable police officer in light of the circumstances would have understood only that the accused *might* be invoking the right to counsel" does not require the cessation of interrogation. *Davis v United States*, 512 US 452, 458-459; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *Adams*, *supra* at 237-238. When the officers questioning the suspect could not reasonably know whether the suspect wanted a lawyer, a rule requiring immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Michigan v Mosely*, 423 US 96, 102; 96 S Ct 321; 46 L Ed 2d 313 (1975). When a suspect makes an ambiguous or equivocal statement, it is proper for the interviewing officer to clarify whether the suspect actually wants an attorney. *Davis*, *supra* at 462; *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995). However, the courts should indulge every reasonable presumption against waiver of fundamental constitutional rights, such as the right to counsel. *Michigan v Jackson*, 475 US 625, 633; 106 S Ct 1404; 89 L Ed 2d 631 (1986). If nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease, and the suspect's postrequest responses may not be used to cast retrospective doubt on the clarity of his initial request for counsel; such subsequent statements are relevant only to the question whether the suspect waived the right he had invoked. *Smith v Illinois*, 469 US 91, 92, 97, 100; 105 S Ct 490; 83 L Ed 2d 488 (1984).

In *Davis*, *supra* at 452, the Court held that the defendant's statement, "*Maybe* I should talk to a lawyer," was ambiguous and subsequent clarifications and questions were proper (emphasis added). Similarly, in *People v Tierney*, 266 Mich App 687, 711; 703 NW2d 204 (2005), the Court held that the defendant's statements, "*Maybe* I should talk to an attorney," and "*I might* want to talk to an attorney," were almost identical to the statement made by the defendant in *Davis*, and thus, the defendant did not unequivocally invoke his constitutional right to counsel (emphasis added). In *Granderson*, *supra* at 676-677, this Court held that because the defendant's response, "Yeah, I'm – I'm ah need that 'cause I can't afford none," could properly be interpreted to be in the *future tense* rather than the present tense, the defendant's request was not unequivocal, and the police officers properly continued the questioning. In *United States v Brown*, 287 F3d 965, 972 (CA 10, 2002), the court found that because the defendant answered, "Yes," both when he was asked whether he wanted to speak to a lawyer and when he was asked whether he would answer questions without a lawyer present, the defendant's request was ambiguous. In *Clark v Murphy*, 331 F3d 1062, 1069 (CA 9, 2003), the court found that the defendant's statement that he *thought* he *would like* to talk to a lawyer was ambiguous.

On the other hand, in *Smith*, *supra* at 91, after the defendant was told that he had a right to counsel, he stated, "uh, yeah, I'd like to do that." Instead of terminating the questioning at this point, the interrogating officers proceeded to finish reading the defendant his *Miranda* rights and then pressed the defendant to answer their questions by "explaining" to him his right to counsel

one more time. The Court held that the defendant's statement could be seen as ambiguous *only* by looking at his postrequest responses, and thus, by looking at the defendant's request and the circumstances *preceding* the request, the defendant unequivocally asserted his right to counsel. *Id.* at 97-98. Similarly, the Court held that the statements, "I do want an attorney before it goes very much further," and "I want an attorney before making a deal," were unambiguous. See *Oregon v Bradshaw*, 462 US 1039, 1041-1042; 103 S Ct 2830; 77 L Ed 2d 405 (1983); *Edwards*, *supra* at 479.

Also, in *Adams*, the Court addressed the issue whether the defendant's statement, "Can I talk to him [a lawyer] right now?" constituted an unequivocal request for an attorney, and decided that it did not. The prosecution argues that the trial court misapplied the decision in *Adams*, *supra* at 226. We disagree because the trial court properly distinguished the *Adams* case. In *Adams*, the transcript revealed that the defendant previously asked whether he would be able to talk to a lawyer *if* he wanted to do so. *Id*. at 238. Here, after Randy Kimes, the detective in charge of the case, told defendant he had the right to a lawyer and asked him if he understood that right, defendant stated, "Yes . . . . can I have one now while we talk?" Thus, there is no contingency similar to the one in *Adams*. Moreover, in *Adam*s, only when the police officer responded that he would stop the interview "right now" if the defendant wanted to speak to an attorney, did the defendant ask whether he could talk to an attorney "right now." *Id.* at 238. Here, there was no such inquiry or response before defendant asserted his right to counsel, and thus, defendant's request was spontaneous and not prompted by Kimes. The defendant in *Adams* also requested a five-minute break to think about whether he wanted to speak to a lawyer. *Id.* at 238. The Court held that this request clearly indicated that the defendant's previous questions were "merely inquiries into the way the process worked, not an actual demand for an attorney." *Id.* Here, there was no request for a break, and defendant's statements were not mere procedural inquiries. Defendant participated in another interview the day before and, when he requested an attorney, the questioning stopped. Thus, because defendant went through the same process the day before, he could not have had the same uncertainty about his procedural rights as the defendant in *Adams*.

Defendant's statement, "can I have one now while we talk?", was an unequivocal assertion of his right to counsel. The trial court properly considered the totality of the circumstances leading up to defendant's request, and decided that all subsequent questioning must have ceased. Again, defendant's postrequest responses may not be used to cast retrospective doubt on the clarity of his initial request for counsel. See *Smith*, *supra* at 92, 97, 100. On September 19, 2004, one day before defendant made his incriminating statement, Kimes learned that defendant wanted a lawyer because Kimes listened to defendant and his family discuss the issue. During that conversation, defendant repeatedly stated that he needed a lawyer and that he did not want to speak to Kimes before getting a lawyer. After defendant made his first confession and after Kimes read defendant his rights, defendant clearly requested the assistance of counsel by stating, "I just need a lawyer, it's just, I'm waiting on my mom, she's gonna [sic] call my daddy right now, he's sending me a lawyer to the County so, that's it, I just need legal advice, I can't . . . . I just want to talk to a lawyer." The interview stopped, and defendant was transported to the Genesee County Jail.

The next day, on September 20, 2004, Kimes claimed that he went to speak with defendant because he was notified by Shanika McBride, defendant's fiancée, that defendant

wanted to speak with him. On the other hand, defendant testified that he asked McBride to arrange a meeting between defendant and his attorney, the prosecutor, and Kimes. Defendant believed that following his previous request for a lawyer, made on September 19, 2004, Kimes was going to bring him a lawyer. Defendant testified that when Kimes and Sergeant Eugene DuBuc showed up without a lawyer, defendant became concerned because he did not expect this. Defendant testified that he asked Kimes where his lawyer was, and told him that he did not want to speak with him without a lawyer. Defendant also testified that he wanted a lawyer to be there during the interview so the lawyer could advise him regarding what questions he may or may not answer. Defendant testified that he elected to speak to Kimes because he was confused about what was going on, and it appeared that his requests for an attorney were futile. Kimes testified that defendant was "almost happy to see [them] because he wanted [them] to come see him. So, defendant was talking without hesitation."

When Kimes asked defendant whether he understood that he had a right to have a lawyer present during the interview, defendant answered, "Yes. . . . can I have one now while we talk?" Instead of answering defendant's question and honoring his request, Kimes told defendant that he would finish reading the *Miranda* rights first and then answer any question that defendant might have. In light of these circumstances, a reasonable police officer would have understood that defendant invoked his right to counsel, and should have ceased any further questioning. See *Davis*, *supra* at 458-459; *Adams*, *supra* at 237-238. Defendant's repeated requests for a lawyer and his previous acquaintance with his procedural rights indicate that his request was not a mere inquiry into the procedural appropriateness of the presence of a counsel, but rather, an invocation of his right to counsel. In addition, Kimes did nothing to honor defendant's previous request for a lawyer after ceasing the first interview. On the contrary, during the second interview, Kimes continued to "clarify" the right to counsel instead of honoring defendant's second or third request to have a lawyer present during the questioning. The trial court, which saw and listened to the interview tapes and defendant's and Kimes' testimony, was in a much better position to determine what evidence was more worthy of credence. See *Tierney*, *supra* at 702-703. Indulging every reasonable presumption against a waiver of his right to counsel, we conclude that defendant's statement was an unambiguous request for a counsel. See *Jackson*, *supra* at 633.

Moreover, were we to interpret defendant's first request for counsel as equivocal, the interview transcript reflects that, during the same interview, defendant made a second request for counsel. After he finished reading the *Miranda* rights, Kimes told defendant that if defendant elected to waive his right to have a lawyer present and later changed his mind, the questioning would stop. Then Kimes asked defendant whether he wanted to waive his right to have a lawyer present. Defendant answered, "No, *I want a lawyer*, but, I do wanna say . . ." Kimes cut defendant off before defendant could finish his statement. Kimes stated "Okay I . . . it can't . . . . okay. This is . . . . ahh . . .," and proceeded to "explain" the significance of the waiver. Defendant testified that Kimes said he was getting tired of that and started "grabbing all of his stuff." Seeing that his requests for a lawyer were futile, defendant elected to speak to Kimes without having a lawyer present and confessed to the attempted robbery and shooting of the victim. Defendant's statement was an unequivocal assertion of his right to counsel. Kimes should have stopped the interrogation, but he failed to do so. See *Davis*, *supra* at 458-459; *Smith*, *supra* at 92, 97, 100; *Edwards*, *supra* at 484-485; *Adams*, *supra* at 237-238. Instead, Kimes did what the courts attempted to prevent by creating the *Edwards* rule: he wore down

defendant and persuaded him to incriminate himself notwithstanding defendant's earlier request for counsel by badgering defendant explicitly or subtly, deliberately or unintentionally. See *Harvey, supra* at 350; *Bradshaw, supra* at 1044; *Mosley, supra* at 105-106. Accordingly, we conclude that the trial court did not err in finding that defendant unequivocally asserted his right to counsel and by suppressing defendant's confession.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh